

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20161124**

**Docket: A-35-16**

**Citation: 2016 FCA 300**

**CORAM: STRATAS J.A.  
WEBB J.A.  
WOODS J.A.**

**BETWEEN:**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Appellant**

**and**

**BINDER SINGH**

**Respondent**

Heard at Toronto, Ontario, on November 24, 2016.  
Judgment delivered from the Bench at Toronto, Ontario, on November 24, 2016.

**REASONS FOR JUDGMENT OF THE COURT BY:**

**STRATAS J.A.**

**Federal Court of Appeal**



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**REASONS FOR JUDGMENT OF THE COURT**  
**(Delivered from the Bench at Toronto, Ontario, on November 24, 2016)**

**STRATAS J.A.**

[1] The Minister appeals from the judgment of the Federal Court (*per* Annis J.): 2015 FC 1415. The Federal Court granted Mr. Singh's application for judicial review from a decision of the Refugee Protection Division.

[2] The Refugee Protection Division (or RPD) determined that Mr. Singh is not a Convention refugee or a person in need of protection because he falls within the criminality exclusion in section 1F of the *Convention Related to the Status of Refugees*, 28 July 1951, Can. T.S. 1969, No. 6. That exclusion has been made part of Canadian law by section 98 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. The RPD went on to find under subsection 107(2) of the Act that there is no credible basis for Mr. Singh's refugee claim.

[3] The central issue before the Federal Court was one of statutory interpretation. Once the RPD determines that a person is not a Convention refugee or a person in need of protection because of a section 98 exclusion, is the RPD precluded under the Act from making a "no credible basis" finding under subsection 107(2) of the Act?

[4] The Federal Court answered this in the affirmative. It set aside the decision of the RPD and remitted the matter back to it to dismiss Mr. Singh's application solely on the ground that he is not a Convention refugee or a person in need of protection under section 1F of the Refugee Convention and section 98 of the Act.

[5] The Minister appeals to this Court, submitting that the Federal Court erred on this statutory interpretation issue.

[6] On appeal from a judicial review, we are first to determine whether the Federal Court selected the proper standard of review and, if so, determine whether the Federal Court properly reviewed the administrative decision using that standard of review. If the Federal Court did not

select the proper standard of review, we are to review the administrative decision using the proper standard of review. See *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45-47.

[7] The Federal Court held that the standard of review is correctness. We disagree.

[8] The first step in determining the standard of review is to characterize the nature of the administrative decision under review: *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171 at paras. 18 and 26-28; *Canada (Attorney General) v. Boogaard*, 2015 FCA 150, 474 N.R. 121 at para. 36.

[9] Here, the RPD's decision is one of statutory interpretation. The RPD was considering its powers under the refugee protection provisions of the Act, statutory provisions "closely connected to its function, with which it will have particular familiarity": *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 54. In *Dunsmuir* and in a number of later cases, the Supreme Court has repeatedly held that reviewing courts in such cases must presume that the standard of review is reasonableness: see, e.g., *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654.

[10] The Federal Court held (at para. 26) that the RPD did not consider the statutory interpretation issues and so its decision should be reviewed on the basis of correctness. We disagree. The Supreme Court has not recognized this as a reason to depart from reasonableness

review. Indeed, in *Edmonton East*, above, the assessment board in that case did not explicitly consider its statutory powers or engage in statutory interpretation because of a concession made by the parties before it. In *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909, the visa officer did not explicitly consider her statutory powers or engage in statutory interpretation. Nevertheless, the Supreme Court held that reasonableness must be presumed as the standard of review. We are bound by these cases. Further, by doing what it did, perhaps the RPD can be taken to have implicitly accepted it had jurisdiction.

[11] In his memorandum of fact and law, the respondent defends the Federal Court's decision to review the RPD's decision on the basis of correctness because issues of international law are involved. In our view, the only possible international law element in this case is the RPD's decision to exclude Mr. Singh under section 1F of the Refugee Convention. But the judicial review in the Federal Court and this appeal in this Court do not concern that issue. Rather, the issue is how certain provisions of the Act, a domestic Canadian statute, should be interpreted. As is seen by the Federal Court's analysis of those sections and by the Minister's submissions in this Court, the content of international law does not bear on this issue.

[12] In the end, the standard of review does not matter in this case. Even on the standard of reasonableness, we consider the RPD's decision to be unreasonable substantially for the reasons of the Federal Court. We substantially agree with the Federal Court's analysis of the relevant provisions of the Act and how they interrelate.

[13] We also agree with the Federal Court's conclusion that this Court's decision in *Xie v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 250, 243 D.L.R. (4th) 385 supports its interpretation of the relevant provisions of the Act.

[14] The Minister submits that the policy objectives of simplicity and conservation of resources bear upon the statutory interpretation process and impel us to accept its view of how the provisions of the Act interrelate. While in the abstract those policy objectives are laudable, we must interpret the Act in accordance with its specific text, surrounding context in the Act and the genuine purposes of the Act: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193. Following that methodology, which the Federal Court also followed, we substantially agree with the Federal Court's analysis. In any event, for the reasons set out in paragraphs 73-76 of Mr. Singh's memorandum, we are not persuaded that the Minister's interpretation of the relevant provisions necessarily advances simplicity and conservation of resources; indeed, a complicated web of overlapping decision-makers and authorities for different aspects of an RPD decision would remain.

[15] The Minister submits that, on the basis of this Court's recent decision of *Canada (Minister of Citizenship) v. R.K. and C.K.*, 2016 FCA 272 and *Alberta Teachers*, above; the statutory interpretation issue here was not before the Federal Court in the sense that the statutory interpretation issue was not raised by the RPD. Thus, the Minister submits that the Federal Court should not have stated the question for the consideration of this Court.

[16] This was not a barrier to this Court or the Supreme Court in *Kanthasamy*, above considering the issue. Further, the “new issue” objection, a discretionary one, was not raised in the Federal Court, does not appear in the notice of appeal, and was not raised in the Minister’s memorandum. Finally, in our view, the issue before us relates to the subject-matter jurisdiction of the RPD, an issue that is live even if the parties before the RPD failed to raise it. An administrator cannot be clothed with subject-matter jurisdiction it does not have: see *Canadian National Railway v. BNSF Railway Company*, 2016 FCA 284 at para. 23 and the authorities cited therein in the context of the subject-matter jurisdiction of a court, but equally applicable to administrative bodies; see also *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2005 SCC 14, [2006] 1 S.C.R. 513 at para. 16.

[17] The Federal Court stated the following question for the consideration of this Court:

Considering the authority of the RPD under section 107(2) and section 107.1 of the IRPA to determine that a claim has no credible basis or is manifestly unfounded, is the RPD precluded from making such determinations after, or in the alternative, to its findings that the claimant is excluded under section F of Article 1 of the Refugee Convention?

[18] The question stated by the Federal Court is broader than is necessary for the facts of this case. There is no question that the RPD is entitled to make “no credible basis” findings under subsection 107(2) of the Act in some circumstances. Therefore, we would reformulate the question as follows:

Considering the authority of the Refugee Protection Division under subsection 107(2) and section 107.1 of the *Immigration and Refugee Protection Act* to determine that a claim has no credible basis or is manifestly unfounded, is the Refugee Protection Division precluded from making such a determination after it has found that the claimant is excluded under section F of Article 1 of the Refugee Convention?

We will answer the reformulated question in the affirmative.

[19] Therefore, despite the able submissions of Mr. Anderson, we will dismiss the appeal.

“David Stratas”

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J.A.



**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:**

A-35-16

**APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE ANNIS OF  
THE FEDERAL COURT DATED DECEMBER 23, 2015, DOCKET NO. IMM-968-15.**

**STYLE OF CAUSE:**

THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION v. BINDER  
SINGH

**PLACE OF HEARING:**

TORONTO, ONTARIO

**DATE OF HEARING:**

NOVEMBER 24, 2016

**REASONS FOR JUDGMENT OF THE COURT BY:**

STRATAS J.A.  
WEBB J.A.  
WOODS J.A.

**DELIVERED FROM THE BENCH BY:**

STRATAS J.A.

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